84-181

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

SUPERIOR WEST SIXTH CORPORATION, Petitioner,

v.

CUYAHOGA COUNTY BOARD OF REVIEW,
TIMOTHY McCORMACK, AUDITOR, CUYAHOGA COUNTY,
AND CLEVELAND BOARD OF EDUCATION, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

DIRENFELD, GREENE &
BLACKBURN CO., L.P.A.
Douglas C. Blackburn
Bernard B. Direnfeld
33 Public Square, Suite 707
Cleveland, Ohio, 44113

Counsel for Petitioner.

10 pp

QUESTIONS PRESENTED

1. Is a notice of appeal, seeking appellate review of administrative determinations of the tax value of a single parcel of real estate for two successive years, jurisdictionally defective solely because both tax years involved were included in a single notice of appeal, where the tax values were determined at the same hearing and upon the testimony of the same witnesses but initiated by two complaints for re-evaluation, absent an express requirement for separate notices of appeal in the statute which created the right of appeal?

2. Does a court's failure to consistently apply its previously decided cases interpreting a statute in pari materia with the statute before the court on an identical factual issue, without compelling reason to disregard the prior ruling, deprive the parties of due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

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TIMOTHY McCORMACK, AUDITOR, CUYAHOGA COUNTY,
AND CLEVELAND BOARD OF EDUCATION, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT

The petitioner Superior West Sixth Corporation respectfully prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court overruling petitioner's motion for an order directing the Court of Appeals for Cuyahoga County to certify its record and dismissing petitioner's appeal for the reason that no substantial constitutional question exists entered in this proceeding on March 21, 1984.

OPINION BELOW

The judgment entries of the Ohio Supreme Court not yet reported, appear in the Appendix hereto. The opinions of the Court of Appeals for Cuyahoga County and the Common Pleas Court of Cuyahoga County are also included in the Appendix hereto.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on March 21, 1984. A timely petition for rehearing was denied on May 2, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257.(3).

STATEMENT OF THE CASE

This case arose when respondent Cleveland Board of Education filed complaints with the Cuyahoga County, Ohio, Board of Revision as to the re-evaluation of real property, for the tax years 1978 and 1979. These complaints sought to establish the fair market value of the property owned by petitioner, Superior West Sixth Corporation, at $800,000 for each of these two years. The Cuyahoga County Auditor, pursuant to his authority, had assessed the market value of the subject property to be $476,000 for 1978 and $400,000 for 1979.

A single hearing was held by the Board of Revision on both complaints and evidence was presented simultaneously with respect to both years. John A. Davis, professional appraiser appearing on behalf of Superior West Sixth Corporation, established the fair market value to be $430,000 for 1978 and $400,000 for 1979.

The Board of Education's appraiser prepared a single report covering both tax years only two days before the hearing on March 6, 1980, which estimated the fair market value of the property to be $800,000 for each year.

On September 16, 1980, after a single hearing on both tax year complaints, the Board of Revision issued its opinion: A fair marekt value of $607,200 for each of the two years. Within the statutory period, petitioner perfected its appeal from this decision to the Court of Common Pleas of Cuyahoga County, Ohio, pursuant to Ohio Revised Code §5717.05. The notice of appeal set forth both of the years (1978 and 1979) appealed from.

All parties were present at several hearings and conferences before the trial court. All parties prepared and submitted written briefs to the court and presented oral arguments on two different occasions to the trial court. Throughout the proceedings all litigants treated the

complaints as to both years as a single unit. It was not until after a final conference was held with the trial judge, during the last week of December, 1982, that the Cleveland Board of Education raised the issue -- for the first time -- of the sufficiency of petitioner's notice of appeal. Subsequent to this conference, the Board of Education filed a motion to dismiss, claiming a lack of jurisdiction. The sole defect claimed was that petitioner had filed a single notice of appeal -- even though the notice clearly identified both complaints. The trial judge granted the motion to dismiss the appeal.

On appeal, a majority of the Judges of the Ohio Court of Appeals, Eighth District, Cuyahoga County, Ohio, affirmed the judgment of the trial court, while the dissenting opinion held that the dismissal was improper and contrary to holdings of the Ohio Supreme Court. A timely appeal was perfected to the Ohio Supreme Court.

On March 21, 1984, the Ohio Supreme Court overruled petitioner's motion to certify, and on May 2, 1984, denied petitioner's motion for a rehearing.

REASONS FOR GRANTING THE WRIT

1. THE NOTICE OF APPEAL, BY A METHOD JUDICIALLY RECOGNIZED AS PROPER, CLEARLY IDENTIFIED THE ISSUES INVOLVED AND INFORMED ALL PARTIES OF PETITIONER'S INTENTION TO APPEAL.

Under Ohio Revised Code Chapter 5717, a taxpayer has two alternative avenues through which to appeal the county board of revision's determination of the value of real property. The first of these, pursuant to Ohio Revised Code §5717.04, begins with a second administrative determination by appealing to the Board of Tax Appeals. An unsatisfactory ruling by the Board of Tax Appeals can be appealed directly to the Ohio Supreme Court. The second avenue, and the one pursued by the petitioner herein, is

pursuant to Ohio Revised Code §5717.05. Under this section the county board of revision's decision is appealed to the county court of common pleas (the court of general jurisdiction) for a trial de novo. Appeal from the court of common pleas is taken in the same manner as any other civil case to the district court of appeals and then to the Ohio Supreme Court. The statutes create no preference for one avenue or the other; the selection is left entirely to the appellant.

The Ohio Courts have failed in this case to apply the clear precedent established by the Ohio Supreme Court in the case of Sunset Memorial Park Assn. v. Evatt, 145 Ohio St. 194, 30 O.O. 414 (1945). In that case, the identical issue was presented to the Ohio Supreme Court on an appeal from the Board of Tax Appeals. In Sunset Memorial Park Assn., supra, the appellee (tax commissioner) moved to dismiss the appeal on the ground that an improper or insufficient

notice of appeal had been filed. A single notice of appeal was filed with the Ohio Supreme Court from the decision on four separate applications to the Board of Tax Appeals involving the same parcels of real estate. As in the present case, the notice of appeal contained the file numbers of each of the four applications. The appellees argued that separate notices of appeal should have been filed for each of the four applications. In its decision the Ohio Supreme Court said: "Quite obviously this would have been the proper procedure; but was it necessary?" 145 Ohio St. 194, 195.

The Ohio Supreme Court denied the appellees' motion to dismiss and stated:

> But, in any event, there is no statutory prohibition against combining several notices of appeal into one complete statement in a single paper or document; . . . ***The court is of the opinion that this was sufficient and that under these circumstances the appellees' motion to dismiss the appeals must be overruled. 145 Ohio St. 194, 195. (Emphasis added.)

The identical situation is now presented by this case, and it is clear that the motion to dismiss the appeal should have been overruled. The trial court's dismissal of the appeal should be reversed and the case remanded for a decision on the merits.

The following comparison of the applicable portions of Ohio Revised Code §5717.04 and §5717.05 clearly demonstrates that the procedure adopted by the General Assembly of Ohio is identical in both statutes, and, therefore, the judicial interpretation of each should be the same.

(Appeal from Board of Revision) §5717.05, par. 1	(Appeal from Board of Tax Appeals) §5717.04, par. 5
Such appeal shall be taken by the filing of a notice of appeal with the court and with the board within thirty days after the notice of the decision	Such appeals shall be taken within thirty days . . . by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board.

One of the principal precepts of statutory interpretation is that remedial statutes are to be liberally construed. In fact, by the enactment of Ohio Revised Code §1.11, which states in part, "Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice", the Ohio Legislature has made this a mandatory rule of interpretation. That Ohio Revised Code §5717.05 is remedial in nature is not disputed. In Van Meter v. Segal-Shadel Co., 5 Ohio St. 2d 185 (1966), at Syllabus (1), the Ohio Supreme Court stated:

> Statutes providing for appeals and for proceedings with respect to appeals and for limitations on the right of appeal are remedial in nature and should be given a liberal interpretation in favor of a right of appeal. (Section 1.11, Revised Code, applied.) (Emphasis added.)

The effect and intent of a liberal construction of a remedial statute was set out

in Porter v. Fenner, 5 Ohio St. 2d 233, 235 (1966):

> No person should be denied the assertion of a cause of action on captious or purely technical grounds and thereby be deprived of his "day in court". To circumvent such a situation, Section 1.11 (Ohio) Revised Code, provides:
>
> "Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.***"

The denial of the petitioner's right to appeal to the Court of Common Pleas from the Board of Revision, purely on the technical grounds that two slips of paper (stating exactly what was stated in a single slip of paper) were required -- constitutes a technical basis for denial of the appeal and a captious approach to the interpretation of a remedial statute, which must be liberally construed. Such an interpretation does not seek to promote the object of the appeals statute, nor to assist the

parties in obtaining justice. Rather, such an approach and interpretation serve only to deprive the appellant of his "day in court".

The policy underlying Chapter 5717 of the Ohio Revised Code is clearly established in Sunset Memorial Park Assn. v. Evatt, supra. In that case, the Court said:

> . . . there is no statutory prohibition against combining several notices of appeal into one complete statement in a single paper or document; . . . (Emphasis added.) 145 Ohio St. at 195.

Although the appeal in Sunset, supra, was filed under the provisions of the predecessor to Revised Code §5717.04 (GC 5611-2) and the instant appeal is filed pursuant to Revised Code §5717.05, since both sections deal with a single subject, i.e., appeal of determinations of the board of revision as to evaluation of real estate, they should be construed in pari materia as a single statute. Roberts v. Briscoe, 44 Ohio St. 596 (1887). Likewise, the Ohio Courts have

determined that judicial interpretations of similar statutes have precedential value and should be utilized in evaluating and interpreting the statute presently being considered by the Court. Heckman v. Adams, 50 Ohio St. 305, 317 (1893); State ex rel Jones v. Board, 93 Ohio St. 14 (1915). See also 50 O. Jur. 2d, Statutes §199.

Therefore, the clear policy announced in the Sunset Memorial Park Assn. case is patently applicable, and, indeed, it is controlling, notwithstanding the unsubstantiated decisions of the single court of appeals relied upon by the appellees. The long-recognized fundamental rules for judicial interpretation of statutes, when properly applied, clearly establish that the decision of the trial court as affirmed by the court of appeals, is improper and should be reversed. A failure to do so deprives the appellant of what is commonly called its "day in court" -- the Constitutionally guaranteed

privilege of due process and equal protection of the law.

The notice of appeal filed by the petitioner herein clearly identified both of the complaints filed with the Board of Revision by the Cleveland Board of Education. Besides identifying each complaint in its body, the notice of appeal had attached to it a copy of the decision letter of the Board of Revision. From the record, it is abundantly clear that no parties were misled, nor did they misconstrue the issues presented on appeal to the Court of Common Pleas. Respondent's motion to dismiss the appeal is based on a purely technical argument and was not made until the very eve of the trial court's decision on the merits of the appeal.

In its brief in support of the motion to dismiss the appeal, respondent cited only two unreported Ohio Court of Appeals cases dealing with the issue. It will be noted that both of

these cases (Hinckley v. Board of Revision, Cuyahoga County Court of Appeals Case No. 44033 [May 6, 1982] and Carnegie Distributing Co. v. Board of Revision, Cuyahoga County Court of Appeals Case No. 42148 [November 23, 1980] were decided after the filing of the notice of appeal in the within action. Neither the respondent, the trial court, nor the Ohio Court of Appeals, nor the opinions relied upon by them, cite any other authority to support their position.

In the Hinckley and Carnegie Distributing cases, the Court of Appeals held that §5717.05 does not authorize the consolidation of separate appeals of separate complaints. This is exactly contrary to the Ohio Supreme Court's holding in Sunset, wherein it was held that, there being no statutory prohibition against it, consolidated appeals are permissible. The Court of Appeals majority opinion did not attempt to reconcile its holding in this case with the holdings in

the Sunset, supra, nor the Maritime Manufacturers, Inc. v. Hi-Skipper (70 Ohio St. 2d 257 [1982]) cases. The dissent in the Court of Appeals likened this appeal to the tenets of Maritime Manufacturers, supra.

The technical rules regarding the format for a notice of appeal (upon which respondent relied to avoid a decision on the merits of the within appeal) were established by the Court of Appeals without supporting authority or reasoning -- and have been subsequently rejected by the Ohio Supreme Court. In Maritime Manufacturers, supra (decided June 23, 1982, subsequent to the cases relied upon by respondent), the Ohio Supreme Court rejected a technical, procedural attack on a notice of appeal and restated that Court's opinion, that:

> The purpose of a notice of appeal, as stated in Capital Loan & Savings Co. v. Biery (1938), 134 Ohio St. 333, 339, is to "***apprise the opposite party of the taking of an appeal." "***If this is done beyond [the] danger of reasonable misunderstanding, the purpose of the notice of appeal is accomplished." Couk v. Ocean Accident & Guar. Corp. [138 Ohio St. 110 (1941)] at page 116. See also, Richards v. Indus. Comm. [163 Ohio St. 439 (1955)]. 70 Ohio St. 2d, at 259.

In further support of this rule -- long established in Ohio -- the Ohio Supreme Court quoted from Foman v. Davis, 371 U.S. 178, 181-182 (1962):

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48.

The Ohio Supreme Court also stated, in its opinion in Maritime Manufacturers, Inc.

> . . . [T]he law favors and protects the right of appeal and that a liberal construction of the rules is required in order to promote the objects of the Appellate Procedure Act and to assist the parties in obtaining justice. In re Guardianship of Love (1969), 19 Ohio St. 2d 111, 115. See, also, In re Guardianship of Wisner (1947), 148 Ohio St. 31, 34-35. "***The legislative purpose throughout the act was obviously to liberalize procedure upon appeals and to prevent technicalities from being fatal to substantive rights." Couk v. Ocean Accident & Guar. Corp., Ltd. (1941), 138 Ohio St. 110, 115.
>
> An examination of the prior decisions of this court reveals that this court has consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of a notice of appeal is challenged solely on technical, procedural grounds. ***In reaching these results, this court has emphasized that the rules must be construed in light of the purpose to which they are to serve. 70 Ohio St. 2d, at 258-259. (Emphasis added.)

Judge Ann McManamon of the Ohio Court of Appeals pointed out in her dissenting opinion that the Ohio General Assembly did not delineate narrow jurisdictional requirements for perfecting an appeal from the Board of Revision, as it did in the Workers' Compensation Act (Ohio Revised Code §4123.519), or for unemployment compensation (Ohio Revised Code §4141.28). She accurately stated the philosophy that should control taxing procedure:

> [T]axes are the lifeblood of any government but it cannot be overlooked that the blood is taken from the arteries of the taxpayers and, therefore, the transfusion is not to be accomplished except in accordance with the scientific methods specifically prescribed by the sovereign power of the state, the Legislature. Urban Redevelopment Condemnation Case, 406 Pa. 6, 11 (1962).

In the within case, the majority of the Court of Appeals adhered solely to its own cases, none of which are binding precedent except between the parties to those particular cases.

See Ohio Supreme Court Rules for the Reporting of Opinions, Rule 2(G)(1) [3 Ohio St. 3d xxii]. None of these cases point to any other court's opinion or reasoning for support. Likewise, none of these cases point to any part of the statutory language employed by the Ohio Legislature to justify or support the requirement which the majority opinion created. The majority opinion created an artificial and technical jurisdictional barrier to the right of tax appeal in tax valuation determinations.

This artificial requirement ignores the practical realities of the purpose of a notice of appeal, as well as the determination by the Ohio Supreme Court of this identical issue, in Sunset Memorial Park Assn. v. Evatt, supra.

2. THE COURTS BELOW IGNORED, WITHOUT REASON OR JUSTIFICATION, CLEARLY APPLICABLE JUDICIAL PRECEDENT.

Although the trial court erroneously held that the petitioner did not file a valid notice of appeal for both years, a sufficient notice of appeal was filed for at least one year. The trial court should have made a decision for at least one year on the merits. The Court of Appeals did not address this issue at all in its majority opinion. However, in a subsequent opinion, by the same Court of Appeals, it was held that, "(w)hen a notice of appeal is taken from two orders, one of which is a timely final appealable order and the second is not, a valid appeal ensues". Szakal v. Raymond A. Connor, Administrator (Cuyahoga County Court of Appeals Case No. 46733 [January 5, 1984]).

This later policy is in full accord with that adhered to in the Federal Courts. This is

exemplified by Kicklighter v. Nails by Jonnie, Inc., 616 F. 2d 734, 739, fn 1 (5th Cir. 1980), wherein, following the United States Supreme Court's cases of United States v. Arizona, 346 U.S. 907 (1953) and State Farm Mutual Automobile Insurance Co. v. Palmer, 350 U.S. 944 (1946), the court concluded:

> . . . it is well settled that an appeal is not lost if a mistake is made in designating the judgment appealed from where it is clear that the 'overriding intent was effectively to appeal'.

The notice of appeal filed by the petitioner herein, without question, indicated the intention to appeal the Board of Revision's determination of the tax value for the years 1978 and 1979. Assuming arguendo, that only a single year could be appealed in a notice of appeal, then the lower courts and all parties were clearly advised of petitioner's intention to appeal and the appeal as to at least one year should have been considered on its merits.

However, if valid notice of the intention to appeal the valuation for one year has been given, has not adequate notice also been given of the intention to appeal the subsequent year as well? There are no jurisdictional prerequisites for a valid notice of appeal from a decision of the county board of revision created under Ohio Revised Code §5717.05 as the Ohio Legislature has established for appeals under Ohio's workers' compensation statutes (Ohio Revised Code §4123.519) or under Ohio's unemployment compensation system (Ohio Revised Code §4141.28). Each of these statutes set forth in detail what must be included in a valid notice of appeal. No such detail is set forth in Ohio Revised Code §5717.05.

The Ohio Supreme Court in the recent case of State ex rel Republic Steel Corporation v. Quinn, 12 Ohio St. 3d 57 (1984) has permitted the filing of appeals, under Ohio Revised Code §4123.519, from the denial of workers'

compensation coverage in two separate industrial injury claims by the filing of a single notice of appeal which clearly identified the claim number, dates of decisions and the other information required for each claim. This is exactly what petitioner has done in this case. The Ohio Supreme Court, in Quinn, has again recognized the efficacy of using a single notice of appeal to perfect an appeal on multiple claims. This procedure was approved despite the Ohio Supreme Court's holding that the procedural requirements of Ohio Revised Code §4123.519 are mandatory and must be strictly complied with before jurisdiction vests in the Court of Common Pleas. Cadle v. General Motors Corp., 45 Ohio St. 2d 28 (1976), Starr v. Young, 172 Ohio St. 317 (1961).

Thus, the present case is not just an exception, with no explanation as to why it is an exception, but has become an aberration in Ohio law. The petitioner has been denied the

statutorily created due process right of appeal where other citizens of Ohio similarly situated would not be denied an appeal.

Having created a right of appeal, it is a denial of the due process and equal protection of the law guaranteed by the Fourteenth Amendment to deprive the petitioner of the right to appeal on such a purely arbitrarily created technical ground. Further, because an identical notice of appeal filed under Ohio Revised Code §5717.04 would have been sufficient, this creates an undue burden on that class of taxpayers which selects to appeal determinations of the county board of revision pursuant to Ohio Revised Code §5717.05.

This burden is not placed on taxpayers filing an appeal under Ohio Revised Code §5717.04. There is no logical reason for this classification and it certainly does not satisfy any compelling governmental interest. In fact, a single notice of appeal would clearly serve

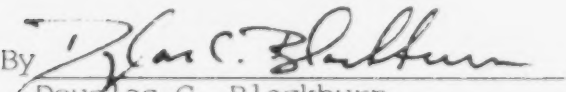
to fulfill a compelling governmental interest in fostering and encouraging the economic and efficient use of judicial effort and time. Since the Ohio Legislature created two equal methods of appeal, there is no rational basis, nor is there any authority, for the creation of different mechanisms for the implementation of that right to appeal.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments of the Ohio Supreme Court and the Cuyahoga County Court of Appeals.

Respectfully submitted,

DIRENFELD, GREENE &
BLACKBURN CO., L.P.A.

By 
Douglas C. Blackburn
Bernard B. Direnfeld

Counsel for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 1984, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the following parties:

Ralph Sobieski, Esq.
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Cuyahoga County Board of Revision
and County Auditor.

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Cleveland, Ohio, 44113,

Counsel for Respondent
Cleveland Board of Education.

DIRENFELD, GREENE &
BLACKBURN CO., L.P.A.

By Douglas C. Blackburn
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Bernard B. Direnfeld
33 Public Square, Suite 707
Cleveland, Ohio, 44113

Counsel for Petitioner.

App. 1

THE SUPREME COURT OF OHIO

THE STATE OF OHIO CITY OF COLUMBUS	)	1984 TERM To wit: March 21, 1984
Superior West Sixth Corp., Appellant, vs. Cuyahoga County Board of Revision et al., Appellees.	)	No. 84-63 MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Direnfeld & Green [sic]

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____ 19____

_____ Clerk
_____ Deputy

App. 2

THE SUPREME COURT OF OHIO

THE STATE OF OHIO)		1984 TERM
CITY OF COLUMBUS)		To wit: March 21, 1984
Superior West Sixth Corp., Appellant,	)	No. 84-63
vs.	)	APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY
Cuyahoga County Board of Revision et al., Appellees.	)	

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CUYAHOGA County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this

Court.

Witness my hand and the seal of the Court this ___ day of _____ 19___

_____Clerk

_____Deputy

App. 3

The Supreme Court of Ohio

Columbus

FRANK D. CELEBREZZE
CHIEF JUSTICE

THE STATE OF OHIO,

City of Columbus. 1984 TERM

Superior West Sixth Corp., To Wit: May 2, 1984
Appellant,

vs. Case No. 84-63

Cuyahoga County Board of
Revision et al.,
Appellees. REHEARING

It is ordered by the court that rehearing in this case is denied.

I, JAMES WM. KELLY, Clerk of the Supreme Court of the State of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 2nd day of May, 1984.

_____ Clerk.

By_____ Deputy.

App. 4

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 46625

SUPERIOR WEST SIXTH CORPORATION Plaintiff-Appellant: -vs- CUYAHOGA COUNTY BOARD OF REVISION, ET AL. Defendant-Appellees:	:	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT OF DECISION: Dec. 1, 1983

CHARACTER OF PROCEEDING: Civil appeal from Court of Common Pleas Case No. 018,634

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

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Cleveland, Ohio, 44113

For Defendant-Appellee Cleveland Board of Education:

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Cleveland, Ohio, 44113

For Other Defendant-Appellees:

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Justice Center
Courts Tower - Ninth Floor
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PATTON, C.J.:

On October 10, 1980, an appeal was initiated in the Court of Common Pleas of Cuyahoga County, contesting the Cuyahoga County Board of Revision's increased valuation of the appellant, Superior West Sixth Corporation's realty for the tax years of 1978 and 1979. The appellee, Cleveland Board of Education, had sought, by separate complaints, an increase of $113,180 for the tax year 1978 and an increase of $139,990 for 1979 on the fair market value of three parcels of land used as a three-story parking garage and restaurant, located on the

northeast corner of West Superior Avenue and West Sixth Street in Cleveland.

On March 6, 1980, a single hearing was held on both complaints, and evidence concerning the contested property's fair market value was provided by the respective parties. Thereafter, on September 16, 1980, the Board of Revision of Cuyahoga County rendered its opinion, increasing the taxable value of such property to $212,520 for each of the two years involved. In rendering its opinion, two separate entries were made in the Board's journal, and two separate decision letters were sent by certified mail to the appellant.

In appealing this determination to the Court of Common Pleas, pursuant to R.C. 5717.05*/, appellant filed a single notice of appeal, which incorporated both determinations of the Board with regard to the ordered increase in valuation on the West Sixth Street property under dispute. On February 24, 1983, appellant's appeal was dismissed by the trial court for failure to file

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*/ Revised Code 5717.05 provides in pertinent part:

> As an alternative to the appeal provided for in section 5717.01 of the Revised Code, an appeal from the decision of a county board of revision may be taken directly to the court of common pleas of the county by the person in whose name the property is listed or sought to be listed for taxation. Such appeal shall be taken by the filing of a notice of appeal with the court and with the board within thirty days after notice of the decision of the board is mailed as provided in section 5717.20 of the Revised Code. The county auditor and all persons who were parties to the proceeding before the board, other than the appellant filing the appeal in the court, shall be made appellees, and notice of the appeal shall be served upon them by registered or certified mail unless waived. The prosecuting attorney shall represent the auditor in such appeal.
>
> * * *

separate notices of appeal from each order of the Board, thereby rendering such appeal jurisdictionally defective. This instant appeal ensued.

Appellant assigns the following error:

> THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S APPEAL WITHOUT A DETERMINATION OF THE MERITS OF THE CASE.

In this sole assigned error, appellant contends that the trial court erred in dismissing its appeal upon procedural grounds. In support of this position, appellant argues that even had separate notices of appeal been filed, due to the identity of the issues involved, both appeals would have been consolidated for purposes of judicial economy. It is therefore appellant's position that the dismissal of this action by the trial court exalted form over substance.

Contrary to the position presently argued by appellant, however, this court has definitively stated on numerous occasions that R.C. 5717.05,

which provides for appeals from the Board of Revision to the Common Pleas Court, does not authorize consolidation of separate appeals from separate complaints. See Carnegie Distributing Co. v. Cuyahoga County Bd. of Revision (Ct. App. Cuy. Cty., Nov. 28, 1980), unreported No. 42148; A. Shaw, Inc. v. Bd. of Revision of Cuyahoga County (Ct. App. Cuy. Cty., Oct. 1, 1981), unreported Nos. 43146, 43147; Hinckley v. Bd. of Revision of Cuyahoga County, et al. (Ct. App. Cuy. Cty., May 6, 1982), unreported No. 44033. As the record sub judice affirmatively establishes that two separate complaints were filed by the appellee, which sought an increase in the disputed property's valuation for two separate and distinct years, that two notices of hearing were mailed to appellant by the Board, that two separate entries were made by the Board on its journal, and that two notices of its decisions were sent by the Board to appellant, we must conclude that two separate and distinct

claims were filed by the appellant and considered by the Board.

In accordance with the holdings of Carnegie Distributing Co., A. Shaw, Inc., and Hinckley, supra, we must, therefore, similarly conclude that the trial court properly dismissed appellant's appeal for failure to properly file separate notices of appeal from each decision of the Board of Revision.

Accordingly, the judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PARRINO, J., CONCURS,

McMANAMON, J., DISSENTS
(see Dissenting Opinion, McManamon, J., attached to Journal Entry and Opinion).

s/John T. Patton
CHIEF JUSTICE
JOHN T. PATTON

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

McMANAMON, ANN, J.:

I respectfully dissent.

Since our rulings in Carnegie, Shaw, and Hinkley, [sic] 1/ cited by the majority, the Ohio Supreme Court has set a new direction in the application of appellate rules. In Maritime Manufacturers, Inc. v. Hi Skipper Marina (1982), 70 Ohio St. 2d 257, the court has posited that a technical defect in a notice of appeal should not bar that appeal. In Maritime the Court of Appeals rejected an appeal on jurisdictional grounds because the notice of appeal erroneously specified that the appeal was taken from an order denying a motion for a new trial rather than from the final judgment on the merits. The Supreme Court, citing a series of cases protecting the right of appeal and a liberal construc-

1/ Carnegie Distributing Co. v. Cuyahoga County Board of Revision (Ct. of App. Cuyahoga Cty., Nov. 28, 1980), No. 42148, unreported; A. Shaw, Inc. v. Board of Revision of Cuyahoga Cty. (Ct. of App. Cuyahoga Cty., May 6, 1982) No. 44033, unreported.

tion of the rules, 2/ stated in Maritime at 259:

> ". . . Although appellant's notice of appeal perhaps did not comply in a technical sense with App. R. 3(C), the notice nonetheless served the purpose intended. A careful review of the record in this case clearly indicates that neither the Court of Appeals nor the appellee can pretend that it was not fully advised by this notice of appeal of just what appellants were undertaking to appeal from."

Clearly, the Appellate Rules should be liberally construed to effect their purpose. The record in the case at bar shows that the notice of appeal served the purpose intended without confusion or prejudice to the litigants. The applicable statute 3/ requires that:

2/ In re Guardianship of Love (1969), 19 Ohio St. 2d 111, 115; Couk v. Ocean Accident and Guarantee Corp., Ltd. (1941), 138 Ohio St. 110, 115 as well as Foman v. Davis (1962), 371 U.S. 178.

3/ R.C. 5717.05.

> "[S]uch appeal should be taken by the filing of a notice of appeal with the court and with the board within thirty days after notice of the decision of the board is mailed as provided in Section 5715.20 of the Revised Code ...."

Unlike the rigidly circumscribed appeal provisions of the Workers Compensation Act 4/ or the procedures for appeals under unemployment compensation, 5/ the General Assembly has not chosen to deny a property owner's right to appeal a property evaluation for tax purposes by delineating narrow jurisdictional requirements.

4/ R.C. 4123.519, provides in part:

> "Notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom ...."

5/ R.C. 4141.28 provides in part:

> "Such notice of appeal shall set forth the decision appealed from. The appellant shall mail a copy of the notice of appeal to the board and to all interested parties by certified mail to their last known post office address and proof of the mailing of the notice shall be filed with the clerk within thirty days of filing the notice of appeal. All interested parties shall be made appellees."

It has been held that:

> "[T]axes are the lifeblood of any government but it cannot be overlooked that the blood is taken from the arteries of the taxpayers and, therefore, the transfusion is not to be accomplished except in accordance with the scientific methods specifically prescribed by the sovereign power of the State, the Legislature."

Urban Redevelopment Condemnation Case (1962), 406 Pa. 6, 11.

It is not for this court to raise a jurisdictional barrier where none has been erected by the General Assembly. I would reverse the decision of the trial court.

App. 5

STATE OF OHIO) IN THE COURT OF
(SS: COMMON PLEAS
COUNTY OF CUYAHOGA) CASE NO. 81-018634

SUPERIOR WEST SIXTH (
CORPORATION,
)
Plaintiff-Appellant,
(
vs. RULING ON MOTION
TO DISMISS
)
CUYAHOGA COUNTY BOARD
OF REVISION, et al.,
(
Defendant-Appellees.
)

ooOoo

BURT W. GRIFFIN, J.:

Plaintiff filed a single notice of appeal from the decision of the Cuyahoga County Board of Revision in complaints 960 (1978) and 8324 (1979). Both decisions resulted in increases in the valuation of plaintiff's property. The complaints were issued separately and separate notices of decision were sent to plaintiff, although the complaints were heard together. The case is currently before the Court on the Cleveland Board of Education's motion to dismiss.

Revised Code §5717.05 does not authorize the filing of a single appeal from separate

decisions of the Board of Revision. Hinckley v. Board of Revision of Cuyahoga County (Ct. App. Cuy. Cty., May 6, 1982) unreported #44033; Carnegie Distributing Co. v. Board of Revision of Cuyahoga County (Ct. App. Cuy. Cty. November 28, 1980, unreported #42148. Thus, plaintiff-appellant's attempt to file a consolidated appeal from two separate decisions, although dealing with the valuation of the same property, is jurisdictionally defective.

Accordingly the motion to dismiss is granted. The case is dismissed as to all defendants, with prejudice. Costs to be borne by plaintiff.

IT IS SO ORDERED.

s/Burt W. Griffin
Burt W. Griffin, Judge

February 23, 1983.

S E R V I C E

A true copy of the within Ruling on Motion to Dismiss was this 23 day of February, 1983, mailed to the following attorneys for the parties herein:

Timothy J. Armstrong, Esq.
Attorney for Cleveland Board of Education
33 Public Square, Suite 909
Cleveland, Ohio 44113

Bernard B. Direnfeld, Esq.
Attorney for Superior West Sixth Corporation
33 Public Square, Suite 707
Cleveland, Ohio 44113

Saundra Curtis-Patrick, Esq.
Attorney for all other appellees
Courts Tower, Ninth Floor
Cleveland, Ohio 44113

BURT W. GRIFFIN
JUDGE

Burt W. Griffin, Judge

App. 6

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

SUPERIOR WEST SIXTH CORPORATION 550 Superior Avenue Cleveland, Ohio, 44113, Plaintiff-Appellant,	)	NO. 018634
vs.	)	NOTICE OF APPEAL FROM CUYAHOGA COUNTY BOARD OF REVISION
CUYAHOGA COUNTY BOARD OF REVISION 304 County Administration Building 1219 Ontario Avenue Cleveland, Ohio, 44113,	)	
VINCENT C. CAMPANELLA, Cuyahoga County Auditor 135 County Administration Building 1219 Ontario Avenue Cleveland, Ohio, 44113,	)	
CLEVELAND BOARD OF EDUCATION 1380 East Sixth Street Cleveland, Ohio, 44114, Defendant-Appellees.	)	

Superior West Sixth Corporation appeals the following findings and orders of the Cuyahoga County Board of Revision, dated September 16, 1980 (copies of which are attached nereto and

made a part hereof), wherein the Board of Revision increased the assessed valuation of appellant's realty for the tax years of 1978 and 1979:

Complaint No. 960 (1978)
Parcel No. 101-10-013, 015, 057,

Complaint No. 8324 (1979)
Parcel No. 101-10-013, 015, 057.

This appeal is based upon the following grounds:

1. The order of the Board of Revision is arbitrary, unreasonable and excessive;

2. That the order is contrary to the weight of the evidence and contrary to law;

3. That there was a denial of due process;

4. That there was improper admission of evidence;

5. That there was improper refusal of submission of evidence;

6. That the assessment order of the Board of Revision was discriminatory and constituted

an unequal application of the law and violated the Ohio and U.S. Constitutions.

DIRENFELD AND GREENE CO., L.P.A.

By s/B. B. Direnfeld
Bernard B. Direnfeld
33 Public Square, Suite 707
Cleveland, Ohio, 44113
621-1900

Attorneys for Appellant.

CERTIFICATION OF FILING

The undersigned, attorney for appellant, hereby certifies that the foregoing notice of appeal was filed with the Cuyahoga County Board of Revision, this 10th day of October, 1980.

DIRENFELD AND GREENE CO., L.P.A.

By s/B. B. Direnfeld
Bernard B. Direnfeld
33 Public Square, Suite 707
Cleveland, Ohio, 44113
621-1900

Attorneys for Appellant.

App. 7

(THE GREAT SEAL OF THE COUNTY OF CUYAHOGA)

County of Cuyahoga

Cleveland, Ohio

CUYAHOGA COUNTY BOARD OF REVISION
304 COUNTY ADMINISTRATION BUILDING
ONTARIO AND LAKESIDE AVENUES

September 16, 1980

[sic]

Cleveland Board of Education	Complaint No. 960 (1979)
1380 East Sixth Street	Parcel No. 101-10-013,
Cleveland, Ohio, 44114	015, 057
	Jr. 239-A

Gentlemen:

In reference to the above complaint, please be advised that upon consideration of the evidence and testimony presented at the Oral Hearing, the Board of Revision, under date of May 8, 1980, found the taxable value of the property to be $212,520, involving an increase of $48,330, and a Building in the assessed value placed upon the above parcel by the Auditor for the tax year(s) Reduction of $2,630, for the tax year 1979 [sic].

Complainants are hereby advised that an appeal of this decision may be made directly to

the Court of Common Pleas of Cuyahoga County pursuant to Section 5717.05 R.C. or to the Ohio Board of Tax Appeals under provisions of Section 5717.01 R.C., within 30 days after date of mailing of this letter.

Very truly yours,

s/Vincent C. Campanella

Vincent C. Campanella, Secretary
CUYAHOGA COUNTY BOARD OF REVISION

CERTIFIED MAIL

VCC: cro Property Owner:
Superior West Sixth Corporation
550 Superior Avenue W.
Cleveland, Ohio 44113

cc: Fred J. Livingstone

cc: Wm. Kaplan

App. 8

(THE GREAT SEAL OF THE COUNTY OF CUYAHOGA)

County of Cuyahoga

Cleveland, Ohio

CUYAHOGA COUNTY BOARD OF REVISION
304 COUNTY ADMINISTRATION BUILDING
ONTARIO AND LAKESIDE AVENUES

September 16, 1980

Cleveland Board of Education	Complaint No. 8324 (1979)
1380 East Sixth Street	Parcel No. 101-10-13-15-
Cleveland, Ohio 44114	and 57
	Jr. 239-A

Gentlemen:

In reference to the above complaint, please be advised that upon consideration of the evidence and testimony presented at the Oral Hearing, the Board of Revision, under date of May 8, 1980, found the taxable value of the property to be $212,520, involving an increase of $72,510. in the assessed value placed upon the above parcel by the Auditor for the tax year(s)

Complainants are hereby advised that an appeal of this decision may be made directly to

the Court of Common Pleas of Cuyahoga County pursuant to Section 5717.05 R.C. or to the Ohio Board of Tax Appeals under provisions of Section 5717.01 R.C., within 30 days after date of mailing of this letter.

Very truly yours,

s/Vincent C. Campanella

Vincent C. Campanella, Secretary
CUYAHOGA COUNTY BOARD OF REVISION

CERTIFIED MAIL

Property Owner: Superior West Sixth Corporation
550 Superior Avenue W.
Cleveland, Ohio 44113

cc: Michael L. Gordon of Kelley McCann and Livingstone

cc: Wm. Kaplan

cc: [C]leveland Law Director

App. 9

Ohio Revised Code

§5717.04 Appeal from decision of board of tax appeals to supreme court or court of appeals; parties who may appeal; certification

The proceeding to obtain a reversal, vacation or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall

be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner or the commissioner of tax equalization of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by either commissioner may be instituted by any of

the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of budget and management, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, by the tax commissioner, or by the commissioner of tax equalization.

Appeals from decisions of the board upon all other appeals or applications filed with and

determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. Such notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the tax commissioner or the tax commissioner of equalization[1], as appropriate, or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

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[1]So in original; should this read "commissioner of tax equalization"?

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

App. 10

Ohio Revised Code

§5717.05 Appeal from decision of county board of revision to court of common pleas; notice; transcript; judgment

As an alternative to the appeal provided for in section 5717.01 of the Revised Code, an appeal from the decision of a county board of revision may be taken directly to the court of common pleas of the county by the person in whose name the property is listed or sought to be listed for taxation. Such appeal shall be taken by the filing of a notice of appeal with the court and with the board within thirty days after notice of the decision of the board is mailed as provided in section 5715.20 of the Revised Code. The county auditor and all persons who were parties to the proceeding before the board, other than the appellant filing the appeal in the court, shall be made appellees, and notice of the appeal shall be served upon them by registered or certified mail unless

waived. The prosecuting attorney shall represent the auditor in such appeal.

When such appeal has been perfected by the filing of notice thereof as required by this section, any appeal from the same decision of the county board of revision theretofore filed under section 5717.01 of the Revised Code with the board of tax appeals shall be dismissed. No appeal shall be taken to the board of tax appeals from the decision of a county board of revision under such section after an appeal from the same decision of the county board of revision has been perfected in the court udner this section.

Within ninety days after notice of appeal to the court has been filed with the county board of revision said board shall certify to the court a transcript of the record of the proceedings of said board pertaining to the original complaint and all evidence offered in connection therewith.

The court may hear the appeal on the record and the evidence thus submitted, or it may hear and consider evidence in addition thereto. It shall determine the taxable value of the property whose valuation or assessment for taxation by the county board of revision is complained of, or in the event the complaint and appeal is against a discriminatory valuation, shall determine a valuation which shall correct such discrimination, and the court shall determine the liability of the property for assessment for taxation, if that question is in issue, and shall certify its judgment to the auditor, who shall correct the tax list and duplicate as required by such judgment.

In correcting a discriminatory valuation, the court shall increase or decrease the value of the property whose valuation or assessment by the county board of revision is complained of by a per cent or amount which will cause such property to be listed and valued for taxation

by an equal and uniform rule.

Any party to the appeal may appeal from the judgment of the court on the questions of law as in other cases.

App. 11

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 44033

LAWRENCE HINCKLEY,	APPEAL FROM
PLAINTIFF-APPELLANT	COMMON PLEAS COURT
-vs-	No. 993046
BOARD OF REVISION OF CUYAHOGA COUNTY, ET AL.	JOURNAL ENTRY AND OPINION
DEFENDANT-APPELLEE	

DATE MAY 6, 1982

PRYATEL, C.J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Appellant is the owner of three parcels of property situated in Cleveland, Ohio. In 1976,

appellant filed three separate complaints for decreases in assessment of real property before the Board of Revision. Board of Revision complaint number 123 involved property with a designated permanent parcel number of 010-22-001.[1/] Board of Revision complaint number 124 concerned property with a permanent parcel number of 010-23-001. Board of Revision complaint number 125 involved permanent parcel number 010-23-002.[2/]

1/ The record does not affirmatively disclose whether this parcel of property was separate or contiguous to the other two. We note in this respect that appellate briefs and the information furnished therein does not constitute part of the record on appeal. See Appellate Rule 9, Anderson v. State, ex rel. Bell (1933) 15 O.L.A. 5.

2/ The Board of Revision's Journal No. 183 "A" reflected an address for the above complaints respectively as "West 11th Street," 830 West Schaaf, and "West 11th Street." The appellant essentially claimed a farm use of these properties.

On December 4, 1978, the Board of Revision conducted a hearing as to these individual complaints and rendered separate judgments thereto.

Rather than file separate appeals from each judgment, appellant filed but one notice of appeal as to all three complaints in common pleas court ostensibly under the provisions of Revised Code §5717.05. On November 5, 1980, appellee Board of Revision of Cuyahoga County filed a motion to dismiss contending that the failure of the appellant to file separate notices of appeal as to each complaint caused the instant appeal to common pleas court to be rendered jurisdictionally deficient. Defendant did not oppose the motion. Thereafter, by judgment entry dated June 11, 1981, the trial court granted the motion to dismiss of appellee Board of Review.

Presently, on appeal to this court, appellant raises the following assignment of error:

I. THE COURT ERRED IN ACCEPTING THE ARGUMENT OF THE APPELLEES THAT, WHEN AN APPELLANT WHO HAS RECEIVED THREE TAX BILLS AND FILED THREE COMPLAINTS FOR REDUCTIONS ON THOSE TAX BILLS, HE IS REQUIRED TO REQUEST A CONSOLIDATION OF THOSE BILLS IN ORDER TO BE PROVIDED A HEARING ON THE PROPERTY AS ONE PARCEL OF LAND WHEN THE THREE LOTS TAXED ARE OWNED BY ONE PERSON AND ABUT EACH OTHER.

At the outset, it should be noted that the record before this court merely discloses a dismissal entry by the trial court. No rationale or explanation as to the exact basis of the ruling is given. Nonetheless, appellant's assertion that the filing of separate appeals is not necessary to vest jurisdiction of all complaints in the trial court is not well-taken. The Department of Tax Equalization Regulations appellant presently cites[3/] (viz. the instructions in the forms prescribed by the DTE) relate to a situation where a single complaint for

---

3/ Specifically, appellant cites the following information in the DTE forms:

several contiguous parcels of property is filed before the Board of Revision. They do not refer to a situation as herein where three individual judgments are rendered on separate complaints. Hence, we find them inapposite.

This court, moreover, has specifically addressed the issue appellant presently raises

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"Multiple Tax Parcels: Only parcels in actual physical contact with each other and with identical ownership and located in the same taxing district may be included in one complaint. If the complaint includes more than one such parcel and the improvements thereon, and the space provided in Item 5 is insufficient to show all parcels, insert the notation 'see attachment' under 'Property description from tax bill,' and attach to the complaint a listing of the description of all such parcels together with the tax value of each such parcel. The amounts to be reported in Item 7 and 8 should be the aggregate figures for all the parcels included in the complaint."

In the form prescribed by the Department of Tax Equalization in DTE Form 4, entitled "Appeal (Secs. 5717.04 or 5717.05 R.C.), it is stated:

"A separate appeal shall be filed as to each parcel of real property involved; except that one appeal may cover more than one parcel where said parcels are in actual contact with one another and are owned by the same taxpayer."

in prior decisions. Specifically, in Carnegie Distributing Co. v. Board of Revision of Cuyahoga County, Ohio, et al. (Ct. App., Cuy. Cty. November 28, 1980), unreported #42148 (appeal dismissed June 22, 1931) a decision which involved an appeal from two separate complaints involving two contiguous parcels of property this court stated

> It is next argued by appellant that the complaints were both heard at a single hearing and should thus require a single notice of appeal. The record shows two complaints were filed by appellant, two notices of hearing were mailed to appellant by the Board, two separate entries were made by the Board on its journal and two notices of its decisions were sent by the Board to appellant. It is apparent, therefore, that two separate and distinct claims for reduction in value of two separate parcels of land were filed by appellant and considered by the Board. It is clear that if appellant had availed itself of the option of filing a single complaint for both parcels, one notice of appeal would have been sufficient. This provision in no way, however, permits the consolidation of appeals from

> separate adverse determinations of separate complaints.
>
> Since R.C. 5717.05, which provides for appeals from the Board of the Common Pleas Court, does not authorize the consolidation of separate appeals for separate complaints, the court properly dismissed the appeal. (at 6, 7).

This decision was subsequently cited with approval by this court in a later case bearing the same caption, viz., Carnegie Distributing Co. v. Board of Revision of Cuyahoga County, et al. (Ct. App., Cuy. Cty. May 28, 1981) unreported #42815. In this latter decision which involved an appeal by the owner of three parcels of land, two of which were contiguous and one of which was across the street from the other two parcels, the sole issue raised was "the necessity for filing separate notices of appeal with respect to all three parcels of property". In affirming the dismissal by the lower court, we stated as follows:

> "Furthermore, the sole substantive issue raised by appellant was decided adversely to it in a previous decision of this Court involving the same parties. In Carnegie Distributing Co. v. Board of Revision (Ct. App. Cuy. Cty. Nov. 23, 1980), No. 42148 this Court held that an appellant must file a separate notice of appeal to court from each decision of the Board of Revision. On the basis of our previous decision, we are persuaded that the trial court did not err in dismissing the appellant's consolidated appeal from the decision of the Board of Revision." (at 3).

In the case sub judice appellant filed but one notice of appeal to common pleas court as to three separate decisions (involving separate parcels) rendered by the Board of Review. We find therefore in view of the foregoing law that the trial court did not err in granting appellee Board of Revisions' [sic] motion to dismiss.

Accordingly, appellant's assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, J., CONCURS

MARKUS, J., CONCURS IN JUDGMENT ONLY.

s/August Pryatel
JUDGE AUGUST PRYATEL
Chief Justice

For plaintiff-appellant: Milt Schulman

For defendant-appellees: John T. Corrigan
(Saundra J. Curtis)

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment of the court and time period for review will begin to run.

App. 12

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 42148

CARNEGIE DISTRIBUTING CO.,	APPEAL FROM
APPELLANT	COMMON PLEAS COURT
-vs-	No. 993,290
BOARD OF REVISION OF CUYAHOGA COUNTY, OHIO, ET AL.	JOURNAL ENTRY AND OPINION
APPELLEES	

DATE Nov. 23, 1980

KRUPANSKY, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

The present appeal was taken from a final order of the Court of Common Pleas of Cuyahoga County dismissing an appeal from a decision of the appellee, Board of Revision of Cuyahoga County (Board)[1/]. The action was initiated on January 10, 1977 upon the filing of two complaints with the Board, viz., Nos. 00194 and 00195, seeking a decrease in the valuation of two parcels of land owned by appellant, Carnegie Distributing Company.

Both complaints were set for hearing on October 23, 1978. Although appellant was duly notified of the hearing, he failed to appear or to present any evidence in support of his claims. At the hearing the matters were considered by the Board and its determinations were made. Two entries, denying reduction in the valuation of the within properties were made upon the Board's

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1/ Vincent C. Campanella, Cuyahoga County Auditor, is also an appellee in this action.

journal dated December 14, 1980[2/]. Appeal was taken to the Court of Common Pleas upon the timely filing of a notice of appeal pursuant to R.C. 5717.05 on January 3, 1979. Thereafter, appellees filed in the Court of Common Pleas a motion to dismiss which was granted on February 29, 1980. It is from the order of the Common Pleas Court granting appellees' motion to dismiss that appellant has taken this appeal.

The appellant assigns one error:

> THE COURT ERRED AND DENIED DUE PROCESS IN HIS [sic] DISMISSAL OF APPELLANT'S APPEAL.

In their motion to dismiss, appellees asserted two grounds for dismissal:

1. Appellant's failure to comply with the jurisdictional requirements of R.C. 5715.13 and 5715.19 by not completely filling out the complaint forms filed with the Board, and

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2/ The entry for Complaint No. 00194 stated the Board's determination was made on October 23, 1978 while the entry for Complaint No. 00195 stated the date of determination as October 30, 1978.

2. Appellant's failure to file two separate notices of appeal, one from each of the two journal entries embodying the decision of the Board.

As to the first ground, appellant contends it complied with R.C. 5715.13 and R.C. 5715.19 by substantially providing the Board with the necessary information required on the Board's complaint form, B.T.A. Form 1.

B.T.A. Form 1 was developed[3/] by the Board pursuant to R.C. 5715.29 and R.C. 5715.30[4/]. B.T.A Form 1, therefore, was a proper form to be utilized for the filing of complaints pursuant to R.C. 5715.13 and 5715.19. R.C. 5715.13[5/]

3/ Beginning with tax year 1978, the forms provided by the Board have been changed to the new Department of Tax Equalization forms.

4/ R.C. 5715.29 and R.C. 5715.30 read in pertinent part as follows:

R.C. 5715.29

"The board of tax appeals shall prescribe such general and uniform rules and regulations and issue such orders and instructions, not inconsistent with law, as it deems necessary, as to the exercise of the powers and the discharge of the duties of all officers which relate to the assessment of property and the levy and collection

of taxes. The board shall cause the rules and regulations prescribed by it to be observed, the orders and instructions issued by it to be obeyed, and the forms prescribed by it to be observed and used.

* * *

R.C. 5715.30

"The board of tax appeals shall prescribe for and furnish to all county boards of revision, county auditors, and county treasurers blank forms for all oaths of office, statement, returns, reports, tax lists and duplicates, abstracts, records of proceedings, complaints, notices of appeals, tax bills, receipts, and all other documents, files, and records authorized or required by any law which relates to the assessment, levy or collection of taxes of the reduction of taxes or by any rules, regulations, orders, or instructions of the board."

Both of the statutes have been amended since the filing of appellant's complaints. The amendments, however, do not alter the substance of the statutes for our purposes here.

5/ R.C. 5715.13 provides:

"The county board of revision shall not decrease any valuation complained of unless the party affected thereby or his agent makes and files with the board a written application therefor, verified by oath, showing the facts upon which it is claimed such decrease should be made.

requires the taxpayer to file an application for reduction in valuation in writing and R.C.5715.19 sets forth the procedural requirements for filing such a complaint.

Revised Code 5715.13 and R.C. 5715.19 must be strictly complied with before the Board of Revision acquires jurisdiction over a complaint. Griffith v. Cuyahoga County Board of Revision (1975), 44 Ohio St. 2d 225; Stanjim v. Board of Revision (1974), 38 Ohio St. 2d 233. Therefore, B.T.A. Form 1 must be completed by the claimant before the Board acquired jurisdiction over the complaint.

On B.T.A. Form 1 there are spaces provided within which the claimant is to indicate the amount of "Decrease Asked," and this amount is to be stated separately for the valuation of both land and building. On both appellant's complaints, appellant failed to indicate the amount of the decreased asked specifically with respect to the land and building, but rather applied a

figure for only the "Total Decrease Asked." It is appellant's contention he thereby supplied sufficient information to the Board.

In support of his contention, appellant points to the following statement contained on the back of the complaint form:

> "Evidence as to valuation must relate to the aggregate assessment of both land and buildings. The over-assessment of land if accompanied with an under-assessment of the building in like amount will not justify any reduction."6/

6/ This statement appears on the back of the new Department of Tax Equalization (D.T.E.) Form.*/ The B.T.A. Form 1**/ provided:

> "Where both land and buildings are the subject of appraisal, evidence of over-valuation must relate to the aggregate assessment of both land and buildings. The over-assessment of land if accompanied with an under-assessment of the building in like amount will not justify an abatement."

*/ This form came into use starting with the tax year 1978.

**/ The form in use relevant to the within proceedings pending below.

It is clear from the above statement that the information concerning separate valuation of land and building is information required by the Board to determine the validity of a reduction claim. By failing to provide this needed information, appellant has failed to strictly comply with R.C. 5715.13 and R.C. 5715.19. The Court of Common Pleas therefore properly dismissed appellant's appeal for lack of subject matter jurisdiction.

Appellant further contends the Board waived the jurisdictional defect by hearing the complaint and making a determination. However, subject matter jurisdiction may not be waived and can be raised at any stage of the proceedings. Sunshine Realty, Inc. v. Cuyahoga County Board of Revision (Cuy. Cty. Ct. App., Aug. 25, 1977), No. 35653;[7/] Bergstrom Paper Company v. Board of Revision (Montgomery Cty. Ct. App., Feb. 4, 1976), No. 5004.

Appellant's first contention lacks merit.

7/ Sunshine Realty involved the following appeals:

Appellant next contends that, under the circumstances of the present case, the filing of two notices of appeal was not required to vest jurisdiction of both complaints in the Common Pleas Court. Appellant argues the building and land are located on one parcel of land and the County Recorder failed to change the parcel numbers after the property had been platted. Appellant, however, presents no facts in the record to support this claim.

It is next argued by appellant that the complaints were both heard at a single hearing and should thus require a single notice of appeal. The record shows two complaints were filed by

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7/(cont'd.)

Court of Appeals - Case Numbers
35653 through 35677; 35780 through 35782;
35817 through 35836; 35871 through 35887;
35889 through 35910; 35918 through 35944;
35947 through 35958; 35963 through 35992;
35994 through 35996; 36013 through 36032;
36881 through 36895; 37478 through 37488;
37514 through 37515; 37568 through 37570;
37651 through 37657; 38012 through 38022;
38180 through 38183.

appellant, two notices of hearing were mailed to appellant by the Board, two separate entries were made by the Board on its journal and two notices of its decisions were sent by the Board to appellant. It is apparent, therefore, that two separate and distinct claims for reduction in value of two separate parcels of land were filed by appellant and considered by the Board.[8/] It is clear that if appellant had availed itself of the option of filing a single complaint for both parcels, one notice of appeal would have been sufficient. This provision in no way, however, permits the consolidation of appeals from separate adverse determinations of separate complaints.

Since R.C. 5717.05, which provides for appeals from the Board to the Common Pleas Court, does not authorize the consolidation of separate appeals for separate complaints, the court properly dismissed the appeal.

8/ Appellant points to the following language contained on B.T.A. Form 1, as authorizing the

Appellant's second contention is without merit and its assignment of error is not well taken.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

---

filing of a consolidated notice of appeal:

"-MULTIPLE TAX PARCELS-

"If more than one tax parcel of land and the improvements thereon is the subject of this Complaint, and the space provided in BTA Form 1 for identification of the real property involved is insufficient to show all parcels, insert in the box captioned 'Permanent Parcel No.' the notation, 'See attachment', and attach a listing of all permanent parcel numbers of the property involved in the Complaint, showing for each all requested data to the extent necessary to enable identification of each parcel and the taxing district in which it is located. Only continguous parcels, owned by the same taxpayer and located in the same county and taxing district, may be the subject of a single Complaint. In such case show in the boxes marked Current Assessed Value, Taxable Value Claimed and Decrease/ Increase Asked, the correct aggregate figures for all tax parcels covered by the [sic]

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRENZLER, C.J. and

PARRINO, J. CONCUR

s/Blanche Krupansky
JUDGE
BLANCHE KRUPANSKY

For plaintiff-appellant: Milt Schulman

For defendants-appellees: John T. Corrigan

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

App. 13

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 46733

GABOR SZAKAL	:	
	:	
Plaintiff-Appellant	:	
	:	
vs.	:	JOURNAL ENTRY
	:	AND OPINION
RAYMOND A. CONNOR, ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, ET AL.	:	
	:	
Defendant-Appellees	:	
	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION: Jan. 5, 1984

CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court No. 052,287

JUDGMENT: Reversed and remanded

DATE OF JOURNALIZATION: _____

APPEARANCES:

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For Defendant-Appellee Raymond A. Connor, Admr., etc.:	Timothy Delaney, Esq. Assistant Attorney General 800 State Office Building 615 West Superior Avenue Cleveland, Ohio 44113
For Defendant-Appellee New Heights Baking Co.:	John A. Peca, Esq. 1500 Leader Building Cleveland, Ohio 44114

PARRINO, J.:

This appeal arises out of a claim for workers' compensation. Appellant claims he is permanently disabled because he was diagnosed as having bronchial asthma on June 8, 1981. He alleges that his disability is the result of and aggravated by exposure to dry flour in the course of his employment with appellee-employer. On September 7, 1982, appellant filed an appeal to the Industrial Commission from the denial of his claim by the Cleveland Regional Board of Review. The Industrial Commission refused to hear the appeal and accordingly filed its order of September 21, 1982 to that effect.

On December 8, 1982, appellant filed a

notice of appeal to the Court of Common Pleas.

The notice of appeal stated:

> "Now comes Gabor Szakal, employee-claimant and claimant-appellant herein, by and through his counsel, and gives notice of his appeal to the Administrator of the Bureau of Workers' Compensation, administrator-appellee, and to his employer, New Heights Baking Company, employer-appellee, of his appeal to the Court of Common Pleas of Cuyahoga County, Ohio, from the decision of the Cleveland Regional Board of Review, and of the Industrial Commission of Ohio in Claim No. OD-179162. Said decision, dated October 7, 1982, was mailed by U.S. Mail by said Industrial Commission of Ohio to claimant-appellant on October 7, 1982, and received by him on October 12, 1982. A copy of said decision is attached hereto and marked 'Exhibit A'.
>
> "Said appeal is made pursuant to the provisions of R.C. §4123.519."

Exhibit A consisted of the Industrial Commission Order which stated:

> "It is ordered that the Appeal filed 9-7-82 by the claimant from the order issued 6-17-82 by the Cleveland Regional Board of Review be refused and that copies of this order be mailed to all interested parties.
>
> "CONSIDERED BY STAFF HEARING OFFICER."

On February 1, 1983, appellee-Connor, Administrator of the Bureau of Workers' Compensation filed a motion to dismiss the notice of appeal. Appellant filed a motion for default judgment on February 9, 1983 because neither appellee had filed a responsive pleading within the 28 days prescribed in Civ. R. 12(A).

On March 11, 1983, the trial court granted appellee-Connor's motion to dismiss and overruled appellant's motion for default judgment.

Appellant timely brought this appeal and cites two assignments of error.

I.

> "The trial court improperly dismissed appellant's appeal, commenced by a notice of appeal, which, read in its entirety, clearly expresses the intent to appeal from the decision of the Cleveland Regional Board of Review."

The primary issue to be addressed is whether appellant's notice of appeal complied with R.C. 4123.519. That statute sets out the procedural requirements for an appeal to the

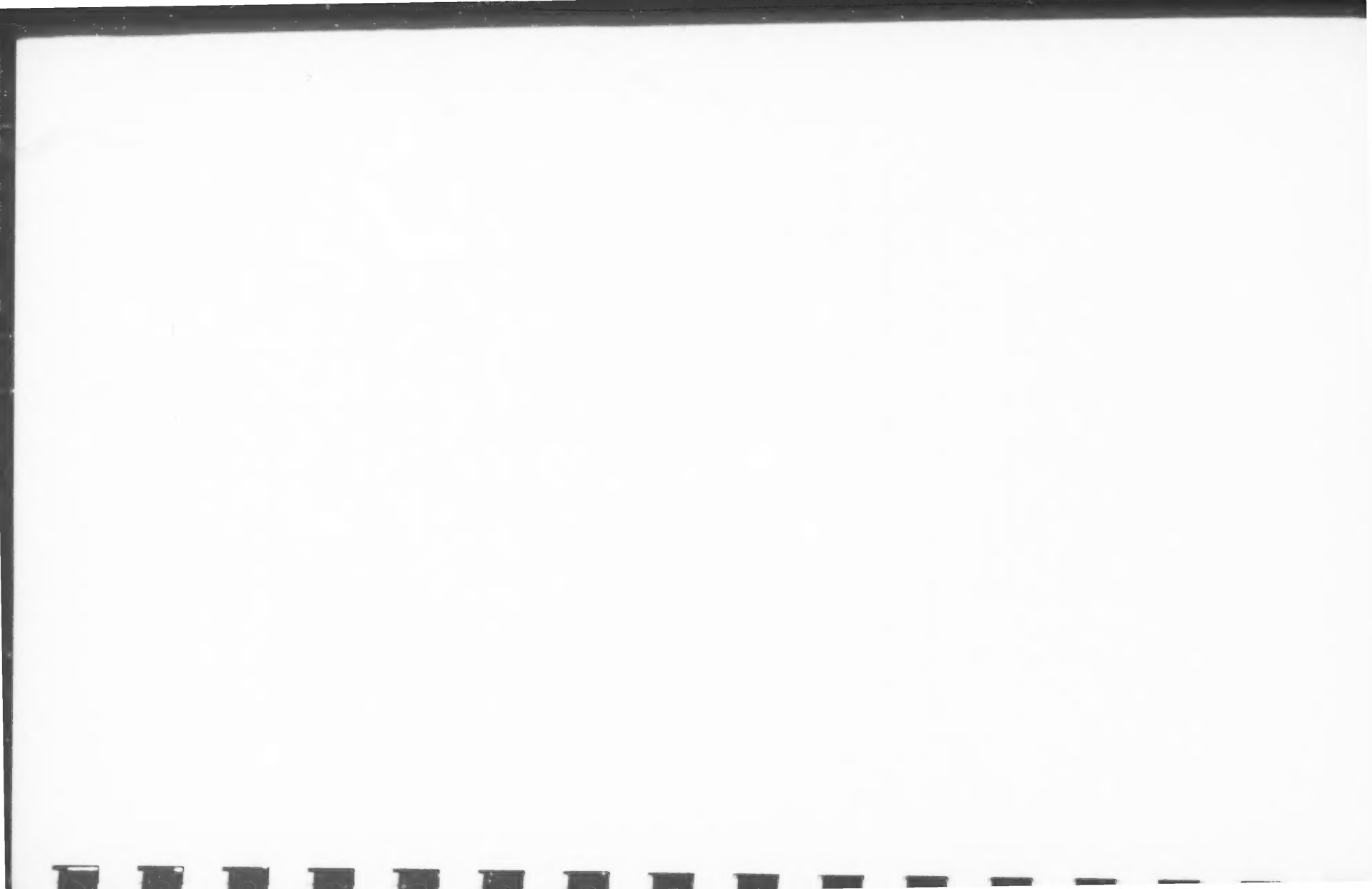
Court of Common Pleas. It provides in part:

> "Notice of appeal shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom."

The statute further provides that a decision of the Industrial Commission can be appealed to the Common Pleas Court; however, if the Commission has refused to entertain an appeal from a decision of the regional board, then the decision of the regional board is the proper decision to be appealed.

Appellees argue that appellant's notice of appeal was fatally defective because it indicated that appellant was appealing from the decision of the Industrial Commission of Ohio rather than the decision of the Cleveland Board of Review. We disagree.

Appellant's notice of appeal consists of two pages, i.e., a face sheet and exhibit A which is attached thereto. To have meaning the



two pages must be read together as a single document. When so read several things become evident. The Industrial Commission refused claimant's appeal taken from the order entered on June 17, 1982 by the Cleveland Board of Review. From this action it is clear that the Industrial Commission made no order from which an appeal could be taken. The language on the face sheet of the notice of appeal indicates that the appeal was taken from the decisions of both the Cleveland Board of Review and the Industrial Commission of Ohio. Exhibit A indicates the date of the decision of the Cleveland Board of Review and that the Industrial Commission refused claimant's appeal.

When the contents of appellant's notice of appeal are considered as a whole, we conclude that the notice of appeal is taken from the decision of the Cleveland Board of Review entered on June 17, 1982 and is valid.

While we concede that appellant's notice of

appeal was not artfully drawn, a practice which we do not condone, a careful reading of that entire instrument justifies our conclusion that compliance was had with the requirements of R.C. 4123.519.

In coming to this conclusion we recognize that the provisions of R.C. 4123.519 are both mandatory and jurisdictional. Cadle v. General Motors Corp. (1976), 45 Ohio St. 2d 28. We respectfully conclude that the facts in the case sub judice, though similar to those in Cadle, are distinguishable. In Cadle the Supreme Court declared that the appeal was taken from a decision of the Industrial Commission of Ohio. In the instant case the notice states that the appeal is taken from the decisions of the Cleveland Board of Review and that of the Industrial Commission of Ohio. When a notice of appeal is taken from two orders, one of which is a timely final appealable order and the second is not, a valid appeal ensues.

We feel that in such instance it would be inappropriate to dismiss the entire appeal because of the author's lack of precise draftsmanship.

Since the Industrial Commission made no final order, reference thereto in appellant's notice of appeal was surplusage and did not nullify the validity of the allegations with respect to the final order entered by the Cleveland Board of Review. See Jones v. General Motors Corp. (1976), 52 Ohio App. 2d 93, cert. denied (4-14-77).

Accordingly, we find that appellant's first assignment of error has merit.

II.

> "The trial court improperly denied appellant's motions for default judgment against appellees for failure to file an answer or otherwise plead within the time required by Ohio Rule of Civil Procedure 12(B)."

Rule 12(A) allows 28 days to file a responsive pleading once the complaint has been filed. No responsive pleading was filed until

after that time limit. Thus, appellant claims his motion for default judgment should have been granted.

The disposition of a motion for default judgment is within the discretion of the trial court, and some of the appropriate factors to be considered are whether defendants abandoned the litigation, whether plaintiff's claim had merit, and whether plaintiff was substantially prejudiced by the delay. Butler v. Plut (Dec. 17, 1981), Cuyahoga App. No. 43586, unreported. In the case at bar, appellees filed motions to dismiss prior to appellant's motion for default judgment, albeit they were filed late. Therefore, they certainly had not abandoned the litigation. The trial court found that plaintiff's appeal had no merit. Furthermore, appellant has advanced nothing to evidence any prejudice caused by appellees' tardiness. Therefore, there was no abuse of discretion by the trial court in denying appellant's motion

for default judgment.

The judgment of the Common Pleas Court is reversed and remanded for proceedings in accordance with this opinion.

This cause is reversed and remanded to Common Pleas Court for proceedings in accordance with this opinion.

It is, therefore, considered that said appellant(s) recover of said appellee(s) his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PATTON, C.J.,

PRYATEL, J., CONCUR

s/Thomas J. Parrino

JUDGE

THOMAS J. PARRINO

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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ALEXANDER L. STEVAS
CLERK

No. 84-181

In The
Supreme Court of the United States
October Term, 1984

SUPERIOR WEST SIXTH CORPORATION,
Petitioner,

vs.

CUYAHOGA COUNTY BOARD OF REVISION, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Chapter 5715 of the Ohio Revised Code establishes a Board of Revision ("Board") in each county of the State of Ohio, with authority to hear and decide complaints against the County Auditor's valuation of real property for taxation. Pursuant to R.C. 5715.19, the Cleveland Board of Education filed complaints for tax years 1978 and 1979 against the property owned by Petitioner.

The Board, pursuant to notice, conducted an evidentiary hearing and considered the testimony of expert witnesses presented by the parties. The Board made separate decisions for each year complained of.

R.C. 5717.05 provides for an appeal of decisions of the Board to the Common Pleas Court, a trial court of general jurisdiction. Petitioner, dissatisfied with the Board's decisions, attempted to appeal to the Common Pleas Court by filing a single Notice of Appeal combining both decisions of the Board.

Subsequently the School Board moved to dismiss the appeal on the basis that petitioner had failed to comply with the requirement R.C. 5717.05 authorizing such appeals.

The trial court sustained the Motion and dismissed the appeal. The Cuyahoga County Court of Appeals upheld the trial court. The Ohio Supreme Court dismissed the appeal taken to it, finding no substantial constitutional question existed.

———o———

ARGUMENT

The Dismissal Of An Appeal From An Administrative Decision For Failure To Comply With Reasonable Statutory Conditions Authorizing Such Appeal Is Not A Violation Of The Due Process Clause.

Petitioner asserts that its due process and equal protection rights were denied when the trial court dismissed its appeal from an administrative decision without judicial review of the merits. The reason for the dismissal was a finding that the Petitioner had not perfected the appeal in the manner required by the statute authorizing such appeal.

The trial court applied the well-established principle of law that compliance with reasonable administrative and statutory directives may be required in order for an appeal to be heard on the merits. The Ohio Courts' judgments are in accord with decisions of this Court in *Ownbey v. Morgan,* 256 U.S. 94 (1921) and *Dodge v. Osborn,* 249 U.S. 118 (1916).

In *Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958) at 366, this Court held:

> "It can hardly be doubted that Congress, acting within the Constitutional powers, may prescribe the procedures and conditions, under which, and the courts in which, judicial review of administrative orders may be had." *Tacoma, supra* 336.

Both state and federal decisions uniformly support the proposition that a failure to comply with the requirements of a statute authorizing an appeal properly results in dismissal of the appeal. See 2 Am Jur.2d *Administrative Law* § 716 and § 732; 73A C.J.S. *Public Administrative Law and Procedure* § 175.

Petitioner presents no direct challenge to the Ohio statutory scheme providing for judicial review of administrative decisions. Nor is it claimed that the due process clause requires that its appeal be heard, whether or not there was compliance with the statute.

Essentially, Petitioner's only claim is that the Ohio Courts have misconstrued their own precedents and have misapplied the Ohio statute. Petitioner asserts that the manner of taking its appeal, when judged by the requirements of the Ohio statute, was not so defective as to warrant dismissal. In support of this proposition, Petitioner

cites cases that involve appeals from different administrative agencies to different courts, or cases that interpret the Ohio Rules of Appellate Procedure. None of Petitioner's cases are directly in point. Petitioner attempts to overcome this fatal deficiency by arguing that the *in pari materia* principle of statutory construction somehow rises to a constitutional imperative.

Due process does not require that all appeals from administrative agencies be taken in the same manner. The legislature can prescribe different methods and means of appeal and remain consistent with the demands of the constitution, *Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958).

The Petitioner does not present new issues of constitutional law, but rather is limited to an alleged misapplication of state law. This is not the type of case that is appropriate for this Court to review.

———o———

CONCLUSION

Rule 17 of the Rules of The Supreme Court of the United States indicates reasons for granting a Writ of Certiorari. The Rule suggests that review may be appropriate if a state court of last resort decides a federal question in a way that conflicts with the decision of another state court of last resort, or if a state court decides a federal question that has not been settled by this Court. The instant petition fails to meet either standard and the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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